STATE OF MICHIGAN

COURT OF APPEALS

BARBARA PEARSON,

Plaintiff/Counter-Defendant-Appellant,

v

FLOOD PROFESSIONALS, INC., d/b/a ADVANCED CLEANING EXPERTS,

Defendant/Counter-Plaintiff,

and

PIONEER STATE MUTUAL INSURANCE CO.,

Defendant-Appellee.

UNPUBLISHED
January 24, 2012

No. 298359
Iosco Circuit Court
LC No. 08-004152-CK

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

BECKERING, J. (*concurring*).

I concur with the majority in their conclusion that the trial court erroneously granted summary disposition to defendant; however, my reasoning differs from theirs.

As the majority explains, this case arises out of plaintiff Barbara Pearson's efforts to seek reimbursement from her insurance carrier, defendant Pioneer State Mutual Insurance Company, for damage to her vacation home stemming from a water leak in the winter. One issue on appeal is whether plaintiff provided a satisfactory proof of loss. After citing authority pertaining to an insurer's potential breach of duty when the insurer fails to inform an insured regarding what constitutes a satisfactory proof of loss, the majority concludes that "defendant did not identify the deficiency contained in the proof of loss" submitted by plaintiff. I respectfully disagree. Defendant specifically informed plaintiff that the amounts on her proof of loss form were "inaccurate and incomplete" and that she "failed to provide adequate documentation (written or otherwise) establishing the nature and extent of [her] claimed loss." Defendant instructed plaintiff to again "complete the Proof of Loss [form] and submit it with supporting documentation for the amount being claimed." Defendant told plaintiff that the appropriate supporting documentation included "building estimates, completed and signed inventory sheets, receipts of personal property purchased, etc." When plaintiff submitted the supporting

documentation over the next several months, defendant continued to request that plaintiff submit another proof of loss form.

The majority concludes that "the issue regarding satisfactory proof of loss in light of the facts and circumstances of this case presented an issue for the trier of fact." I would frame the issue for factual determination as whether plaintiff substantially performed her contractual duty of submitting a proof of loss.

"Michigan follows the substantial performance [of a contract] rule." *P & M Constr Co v Hammond Ventures, Inc*, 3 Mich App 306, 315; 142 NW2d 468 (1966) (citations omitted). "A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract." *Gibson v Group Ins Co*, 142 Mich App 271, 275; 369 NW2d 484 (1985) (quotations omitted). Substantial performance does not apply to the fulfillment of express conditions but, rather, applies to the performance of promises under a contract. See *Fisher v Burroughs Adding Machine Co*, 166 Mich 396, 402-403; 132 NW 101 (1911) (explaining that a party to a contract cannot recover in quantum meruit where there has been substantial performance if an unfulfilled condition precedent has not been waived).[1] "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor." *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006)(quotations omitted). "[U]nless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract." *Id.*

In the present case, the language of the insurance policy does not make clear that the parties intended the proof of loss provision to be a condition precedent. *Id.* The policy does not state that defendant's obligation to perform is contingent on plaintiff submitting a proof of loss. Rather, the policy merely states that plaintiff "must see" that she submits a signed, sworn proof of loss in the "case of a loss to covered property." Thus, the policy's language only creates a duty for plaintiff to perform. Therefore, the proof of loss provision is a promise, and the doctrine of substantial performance applies.[2] *Id.*; *P & M Constr*, 3 Mich App at 315; *Fisher*, 166 Mich at 402-403; *Brown-Marx Assoc*, 703 F2d at 1367-1368.

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[1] See also, as persuasive authority, *Star of Detroit Line, Inc v Comerica Bank*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 1999 (Docket No. 198090); *Brown-Marx Assoc, Ltd v Emigrant Savings Bank*, 703 F2d 1361, 1367-1368 (CA 11, 1983).

[2] Defendant's reliance on *Fenton v Nat'l Fire Ins Co*, 235 Mich 147, 150; 209 NW 42 (1926), for the proposition that Michigan courts have consistently held that compliance with a proof of loss provision is a condition precedent to recovery is misplaced. *Fenton* involved a policy specifically for fire insurance, and 1917 PA 256 required fire insurance policies to contain a proof of loss provision that operated as a condition precedent to recovery. *Fenton*, 235 Mich at 148, 150; *Peck v Nat'l Liberty Ins Co of America*, 224 Mich 385, 385-386; 194 NW 973 (1923). Moreover, we have applied the doctrine of substantial performance to determine whether an

When determining substantial performance in the context of a proof of loss provision, courts should consider the intended purposes of a proof of loss: (1) allowing the insurer to investigate the insured's claim; (2) allowing the insurer to investigate its rights and duties; and (3) preventing fraudulent claims. *Wineholt v Cincinnati Ins Co*, 179 F Supp 2d 742, 749-750, 752 (WD Mich, 2001); see also *Jajo v Hartford Cas Ins Co*, unpublished memorandum opinion of the Court of Appeals, issued November 26, 2002 (Docket No. 237955); 16 Williston on Contracts (4th ed), § 49:110; 13 Couch, Insurance, 3d, § 186:22. Whether a party to a contract has substantially performed is a question of fact. *Antonoff v Basso*, 347 Mich 18, 28-29; 78 NW2d 604 (1956); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 619; 600 NW2d 66 (1999).

Under the insurance policy in the present case, plaintiff had a duty to submit a signed, sworn proof of loss to defendant "within 60 days after the loss, unless such time [was] extended in writing by [defendant]." Plaintiff also had a duty to set forth, "to the best of [her] knowledge and belief," the following, among other things: specifications of damaged buildings; detailed repair estimates; receipts for living expenses incurred; and an inventory of damaged personal property, specifying and substantiating with "bills, receipts and related documents" the "quantity, description, actual cash value and amount of loss for each item." Before defendant denied liability for plaintiff's claim, plaintiff submitted a signed, sworn proof of loss form to defendant. The proof of loss form contained the following provision: "Any other information that may be required will be furnished and considered a part of this proof." Plaintiff claimed her policy limits and completed all parts of the form except for two sections that requested amounts for both the actual cash value of the insured property and the whole loss. When defendant later requested "supporting documentation" for plaintiff's claim, plaintiff provided repair and damages estimates and an inventory of personal property. Plaintiff did not, however, comply with defendant's request to submit an additional signed proof of loss form.

Given these facts, reasonable minds may disagree about whether plaintiff substantially performed her duty to submit a proof of loss; therefore, a genuine issue of material fact exists. *Jimkoski v Shupe*, 282 Mich App 1, 4-5; 763 NW2d 1 (2008). I would reverse and remand for the trier of fact to determine whether plaintiff substantially performed her proof-of-loss obligation.

/s/ Jane M. Beckering

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insured fulfilled his contractual obligation to cooperate with an insurance investigation. *Gibson*, 142 Mich App at 275-276. And, we have also applied the doctrine to determine whether an insured substantially complied with his contractual obligation to submit a proof of loss. *Jajo v Hartford Cas Ins Co*, unpublished memorandum opinion of the Court of Appeals, issued November 26, 2002 (Docket No. 237955). Most jurisdictions do the same. 16 Williston on Contracts (4th ed), § 49:110 ("[M]ost courts require substantial, rather than literal, compliance with proof of loss requirements set forth in insurance policies."); see also *Wineholt v Cincinnati Ins Co*, 179 F Supp 2d 742, 748-749 (WD Mich, 2001) (explaining that the prevailing view is that an insured need only substantially comply with a policy's proof of loss provisions).